IT(EA)R Rule 29 – costs

Milford Haven Port Authority v IC & Richard Buxton Environmental and Public Law & South Hook Lng Terminal Co Ltd

EA/2007/0036
6th November 2007

Cases:
Bowbrick v IC and Nottingham City Council [2006] UKIT EA_2005_0006

Baldwin v FSA Fin/2005/0011

Davidson v the FSA

Facts

The IC issued a Decision Notice that ordered that disputed information which constituted Environmental Information be disclosed to the 1st Additional party. The IC also found that the Appellant was in breach of Regs 5(2) and 14(2) EIR and had not provided the information requested or a refusal notice within the specified time limits. The Appellant appealed to the Tribunal against the IC's Decision Notice. Later the Appellant decided to withdraw its appeal and disclosed the disputed information to the Additional Party. The 1st Additional party then applied to claim their costs, stating that the Appellant's conduct was caught by Rule 29(1)(c) and in effect the appellant had abused the FOI/EIR process to delay disclosing the disputed information for several years. Therefore the case concerned the consideration of that application.

Findings

The Tribunal did not find that the application raised questions as to whether the Appellant has been responsible for "frivolous or vexatious" action, but only whether its conduct was "improper or unreasonable". They stated that even if they were wrong to interpret the application in this way they found that the conduct in this case was not frivolous or vexatious. As a result they restricted their considerations as to whether the Appellant's conduct was improper or unreasonable.

The Tribunal analysed an email which the 1st Additional party stated was unreasonable and concluded that it was a consultation document setting out the position following the Decision Notice. Summarised were the IC's findings, the position on the confidentiality agreement, the need to decide whether to appeal, the tactics and public position on whichever action they decide and the fact that the matter was also in the hands of the lawyer. The Tribunal held that this was a reasonable approach and was entirely proper.

The Appellant brought the Tribunal's attention to other proceedings with the implication that it was the 1st Additional Party who was being unreasonable. They did not accept this line of argument as it had no relevance to the application.

The Appellant raised the Indemnity Principle and whether the 1st Additional Party could bring such an application for costs where it could not show that it had incurred costs which ought to be reimbursed. The 1st Additional Party were professional advisers who maintained that they made the FOI/EIR request on behalf of Safe Haven and Alison Hardy (the original complainants) who were concerned with the environmental issues raised by the disputed information. These complainants they maintained, were liable for their costs. The Tribunal stated that it is not unusual for advisers to make FOI/EIR requests in their own name on behalf of clients who would be liable for their costs. The Tribunal agreed that the principle did not apply in this case.

The 1st Additional Party argued that the Appellant was wrong to have brought the appeal or at least not to have withdrawn it at an earlier stage, suggesting that the Appellant took a wrong view or approach. The Tribunal considered the test of unreasonableness considered in the cases of *Bowbrick, Baldwin* and *Davidson* and held that even if the appellant did take the wrong view or approach, they agreed with the FSMT's decision in *Baldwin* that this is not necessarily an unreasonable view or approach. In their view these were proper matters for any party considering an appeal or which would need to be determined by the Tribunal on an appeal. Therefore they did not find them improper or unreasonable actions. The Tribunal also agreed with the Appellant's submission that the case should be distinguished from that of *Bowbrick* as there was no dispute that the information existed.

The Tribunal accepted that the time it takes to withdraw an appeal is a factor which needs to be taken into account in determining an application for costs, however in this case they found that the time taken was not unreasonable.

Conclusion

The Tribunal found that the Appellant did not improperly and unreasonably under rule 29 and therefore made no order for costs.